IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner-Appellant,

v

HAROLD W. DORAN,

Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF MICHIGAN

MEMORANDUM OPPOSING SUGGESTION OF MOOTNESS

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Dated: September 18, 1978

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On December 18, 1975, Harold W. Doran was arrested in Bay City, Michigan, and charged with receiving and concealing stolen property under the laws of the State of Michigan, MCLA 750.535; MSA 28.803. The Michigan authorities immediately notified local authorities in Maricopa County, Arizona, and Arizona authorities issued a warrant for Doran's arrest charging him with the theft of a motor vehicle or, in the alternative, theft by embezzlement pursuant to Arizona law. Eventually the Michigan criminal charge was dismissed, and Doran was continued in custody while Arizona attempted to extradite him. On February 11, 1976, the Governor of Arizona issued a requisition for extradition which was accompanied by the original criminal complaint and warrant plus two supporting affidavits. On March 12, 1976, the Michigan Governor issued a Governor's warrant.

Doran petitioned in the Michigan courts for a writ of habeas corpus, and on October 4, 1977, the Michigan Supreme Court issued its opinion and final process which reversed the judgment of the Michigan Court of Appeals and the Circuit Court for the County of Bay and ordered Doran released from custody forthwith.

The Attorney General of the State of Michigan filed a petition for writ of certiorari which was docketed on February 27, 1978. On April 17, 1978, the petition for writ of certiorari was granted. Briefs have been filed and this matter is scheduled for oral argument on October 4, 1978.

Counsel for Doran has filed a memorandum suggesting mootness and two affidavits detailing efforts of counsel and her investigator to ascertain the present location of Doran. The affidavits indicate that contact has been made with his father, his visitors during incarceration, local hospitals, the Michigan Department of Health, the county sheriff's department and the Law Enforcement Information Network with no information being ascertained which would indicate where Doran is currently living. Counsel for Doran speaks of a strong possibility, a likelihood, and an inference that he has left the state.

Counsel makes the point that under Article III of the Constitution, in order to exercise its judicial power, this Court must find that a case or controversy exists and that the Court can only decide questions which affect the rights of the particular litigants in the case at bar. North Carolina v Rice, 404 US 244, 246; 92 S Ct 402; 30 L Ed 2d 413-415 (1971). Counsel argues that the case must be definite and concrete and that there must be a substantial controversy as distinguished from a hypothetical state of facts citing Aetna Life Insurance Co v Hayworth, 300 US 227-240, 241; 57 S Ct 461; 81 L Ed 617 (1937); North Carolina v Rice, supra, 404 US at 246; Preiser v Newkirk, 422 US 395, 401; 95 S Ct 2330; 45 L Ed 2d 272 (1975).

Doran's counsel asserts that the present posture of this litigation is such that a determination of the merits by this Court

would have no significant impact on the "concrete interests of the parties" because if the State of Michigan should prevail and regain the power to extradite Doran, "there will in all likelihood, be no subject matter upon which this power may be exercised." Counsel alleges that Doran is not now under any legal compulsion to return to the state of Michigan if he has left and that this case does not fall within the "capable of repetition, yet evading review" branch of the doctrine of mootness. Southern Pacific Terminal Co v ICC, 219 US 498; 31 S Ct 279; 55 L Ed 310 (1911). Counsel further asserts that although the state of Michigan may be confronted in the future with similar factual situations, the recurring dispute would probably not be between the state of Michigan and Doran, citing Weinstein v Bradford, 423 US 147; 96 S Ct 347; 46 L Ed 2d 359 (1975); Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 145 (1973); Nebraska Press Association v Stuart, 427 US 539; 93 S Ct 2791; 49 L Ed 2d 683 (1976).

Counsel's argument rests solely upon the fact that Doran has not had any need to contact her and has not informed her of his location. Counsel for Doran cannot affirmatively demonstrate either where he is or where he is not and therefore she is only providing information from which she wishes the inference to be drawn that Doran is no longer in Michigan. However, as a practical matter, it is to Doran's advantage to remain in Michigan not risking extradition until this Court has ruled on the merits of the challenge to the Michigan Supreme Court opinion.

The investigator's affidavit alleges that a letter was sent to Doran at his last known address in care of his father, but the affidavit is strangely silent as to whether the letter was returned undelivered by the postal authorities. It is also curious that the affidavit does not indicate that counsel contacted either the office of the Bay County Prosecutor or William Caprathe, the public defender who initially represented Doran in Bay County.

It should also be noted that in state circuit court Doran, through his counsel William J. Caprathe of the Bay County Public Defender's Office, attempted to obtain release on bond and also filed a motion for bond on appeal. In the Motion for Bond on Appeal filed in the Michigan Supreme Court on April 11, 1977, counsel made the following assertions:

> "There is no doubt that Mr. Doran, if released on bond, would appear when required in response to the order of the court. Mr. Doran is a man of fifty-three, is a native of Bay City and has close ties to the community, in particular his father, William Doran, who resides at 710 S. Arbor in Bay City. Mr. Doran's father, who lives alone is elderly and requires Mr. Doran's care."

While counsel asserts that Doran is not living with his father, there is no indication that if his father were in need of his assistance Doran would not appear or that Doran has permanently severed all communication with his father.

The memorandum asserts that even if the People of the State of Michigan prevail and regain the power to extradite Doran he will not be found, and therefore, the People will have a hollow power which they cannot exercise. However, if this Court were to sustain the position of the People, Harold Doran would be a fugitive and at that point all of the law enforcement officials in Michigan would be able to search for him to secure his arrest and detention. Such a search would undoubtedly be more thorough than that undertaken by counsel and her investigator. At this time because the Michigan Supreme Court has released Doran and has stated that he is not a fugitive, the People are powerless to order Michigan law enforcement officials to detain him. Therefore, the People have not invested time and money in a futile gesture.

The memorandum admits that similar extradition disputes may confront Michigan in the future. It is obvious from the opinion of the Michigan Supreme Court that the rule in Michigan, if allowed to stand, is much more stringent than it was before and is more

stringent than that in many of the other States. For that reason it is probable rather than possible that similar disputes will occur in the future. It is also probable that the Michigan courts will follow the opinion of the Michigan Supreme Court and will release those individuals who are being held in situations similar to that of Harold Doran. In that case the State of Michigan will never have a situation any different than the situation now confronting this Court. Following the opinion of the Michigan Supreme Court if an individual is being detained on the basis of documents which are found to be insufficient and the person is released as was Doran, the People of the State of Michigan, following the logic of Doran's counsel, would never be able to have this Court review the decision of the Michigan Supreme Court.

The memorandum also does not address the fact that Michigan's Governor signed a warrant which would have been executed but for the opinion of the Michigan Supreme Court and which will be executed if the position of the People is upheld by this Court. The memorandum also does not affirmatively state that the State of Arizona has obtained custody of Doran from any other state or that the State of Arizona for whatever reason no longer wishes to obtain custody of Doran. That in fact is not the case.

The District Attorney in Phoenix, Arizona, has been advised by the Solicitor General of Michigan of the filing of briefs in this case and the scheduled date of oral argument. The last communication with Arizona indicated that the authorities there did not have custody of Doran and were desirous of prosecuting him.

It is the position of the People of the State of Michigan that as long as a Michigan Governor's warrant has been issued which would be executed in the event the People were to prevail, and the State of Arizona does not yet have custody of Harold Doran, the case is not rendered moot.

In the case at bar the situation is no different than it was on the day in which the petition for writ of certiorari was filed. When Harold Doran was released by the Michigan Supreme Court, he was free to go wherever he chose. The People of the State of Michigan have never at any time in the petition or in their brief made any assertions regarding Doran's location. Also at the time that Doran's counsel moved to proceed in this Court in forma pauperis, she asserted in her motion that she had not had any contact with Doran. Therefore, this matter is factually in no different posture than it was when it was initially filed in this Court.

In Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), this Court was confronted with the situation in which those pregnant women who brought the suit were obviously no longer subject to the pregnancies which initiated the lawsuit in 1970. In denying a mootness challenge the Court considered the fact that the normal human gestation period is so short that a pregnancy would come to term before the usual appellate process could be completed, and that therefore, if the termination of pregnancy mooted the case, pregnancy litigation would seldom, if ever, survive beyond the trial stage and appellate review would be effectively denied. In reaching the conclusion that the law should not be that rigid the Court found a classic justification for a conclusion of non-mootness and a situation which could be "capable of repetition, yet evading review."

Although not a requirement for the survival of man, crime and extradition will probably always be with us, and as long as the Michigan Supreme Court provides for release of individuals like Doran, appellate review of Michigan extradition litigation will be effectively denied if the logic of Doran's counsel is followed.

In Southern Pacific Terminal Co v ICC, 219 US 498, 31 S Ct 279; 55 L Ed 310 (1911), this Court originally enunciated the

"capable of repetition yet evading review" standard of the law of mootness. In that case it was held that because of the short two-year duration of a challenged ICC order, it was virtually impossible to litigate the validity of the order before it had expired. The Court allowed review even though the order in question had expired by its own terms and indicated that the matter was probable of repetition and it was also probable that the same party would be subject to a same or similar order in the future.

> "In the case at bar the order of the Commission may to some extent (the exact extent it is necessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a change of redress." 219 US 515.

In Sosna v Iowa, 419 US 393; 95 S Ct 553; 42 L Ed 2d 532 (1975), an attack was made against the durational residency requirement to obtain a divorce in Iowa. The suit was certified as a class action so that the named plaintiff might represent the class of residents who had resided within Iowa for less than a year and who desired to initiate actions for dissolution of marriage or legal separation. A three-judge court by a divided vote upheld the constitutionality of the Iowa statute. When the case reached this Court, the Court felt obliged to address the question of mootness before reaching the merits of the appellant's claim. By the time the case reached this Court, the plaintiff had long since satisfied the Iowa residency requirement and, it, therefore, no longer stood as a barrier to her attempts to secure dissolution of her marriage in the Iowa courts. The named plaintiff had, in fact, obtained a divorce in New York. The Court stated that if

the appellant had sued only on her own behalf, the fact that she now satisfied the residency requirement and had obtained a divorce elsewhere would make the matter moot and would require dismissal. However, because the matter had been certified as a class action, the Court found that factor significantly affected the mootness determination.

In Sosna, the Court indicated that it was not willing "to speculate that she may move from Iowa, only to return and later seek a divorce within 1 year from her return. . . ." The Court went on to state:

> "But even though appellees in this proceeding might not again enforce the Iowa durational residency requirement against appellant, it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the district court certified. In this sense the case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion." 419 US 400.

In Sosna, the Court would have had to speculate as to Sosna that she would leave Iowa, move back again to Iowa, marry again, and seek a divorce from someone within one year of her return to Iowa. The case at bar hardly requires as much speculation as Sosna.

In Weinstein et al v Bradford, 423 US 147; 96 S Ct 347; 46 L Ed 2d 350 (1975), a prisoner sued the members of the North Carolina Board of Parole in federal district court claiming that they were obligated under the Fourteenth Amendment of the Constitution to afford him certain procedural rights in considering his eligibility for parole. Although Bradford sought certification as a class action, the district court refused to certify the case and dismissed the complaint. On appeal to the Court of Appeals for the Fourth Circuit, the prisoner's claim was sustained.

After the petition for certiorari was granted and the case was set for oral argument, Bradford filed a suggestion of mootness. The judgment of the Court of Appeals was vacated and the case was remanded to the district court with instructions to dismiss the complaint. In reaching this result, this Court considered the fact that Bradford had been temporarily paroled and subsequently completely released from supervision. The Court found that it was clear that Bradford had absolutely no interest in the procedures which were subsequently followed by the Parole Board in granting parole to other individuals. The Court also found that Bradford, who had initially challenged the parole board procedures, "no longer has any present interest affected by that policy." 423 US 148. The Court was unwilling to find that there was a demonstrated probability that Bradford would again be among those individuals who by virtue of future conviction and incarceration would come within the jurisdiction of the parole board.

In DeFunis v Odegaard, 416 US 312; 94 S Ct 1704; 40 L Ed 2d 164 (1974), Marco DeFunis, Jr., unsuccessfully applied for admission to law school and asserted that the school's admission policy resulted in the constitutional denial of his application. The trial court agreed and granted the requested relief. DeFunis entered law school, and by the time the case reached this Court and was argued, DeFunis was registered for his last term of law school. The law school indicated that DeFunis would be allowed to complete the term, and it was obvious that he would receive a diploma. In dismissing the case as moot, the Court stated that all of the parties had indicated that the status of DeFunis would not be affected by anything that the Court might express on the merits of the controversy. In finding that DeFunis did not present a question "capable of repetition, yet evading review", the Court determined that DeFunis would never again run the gauntlet of the law school admission process and so that as to him the question

was certainly not capable of repetition. He had completed a once in a lifetime experience.

In Socialist Labor Party v Gilligan, 406 US 583; 92 S Ct 1716; 32 L Ed 2d 317 (1972), an appeal seeking to invalidate various Ohio laws restricting minority party access to the ballots was dismissed. During the pendency of the appeal the Ohio legislature revised the election code which mooted the issues on appeal to all but one of the issues decided below. The one remaining issue, a challenge to a loyalty oath, was factually not well-developed. In dismissing the case the Court recognized that even if jurisdiction exists it should not be rendered unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." 406 US 588. Unlike the Socialist Labor Party the record in this case is factually very well developed and the constitutional issue could not be clearer.

Doran's counsel indicates that his case is analagous to appeals from convictions in which the defendant has escaped. However, such an analogy is clearly inappropriate. An escape by one who is appealing his conviction or his sentence is clearly a voluntary relinquishment of a right possessed by the individual. Harold Doran should certainly not have the ability to relinquish the state's right to review of an erroneous decision.

In Smith v United States, 94 US 97; 24 L Ed 32 (1876), the Court denied a motion to set the case for oral argument indicating that it was clearly within its discretion to refuse to hear a criminal case unless the convicted party who was suing out the writ was where he could be made to respond to any judgment rendered.

Of similar import is Eisler v United States, 338 US 189; 69 S Ct 1453; 93 L Ed 1897 (1949), in which the petitioner fled from the country after his petition for writ of certiorari was

granted and after his cause was submitted on the merits. The court again stressed the fact that the petitioner by his own volition may have rendered moot any judgment on the merits which he had sought.

In Nebraska Press Association v Stuart, 427 US 539; 96 S Ct 2791; 49 L Ed 2d 683 (1976), this court determined that an order accommodating the defendant's right to a fair trial and the petitioner newspaper's interests in reporting pretrial events was not moot even though in the interim the criminal defendant was convicted of murder, sentenced to death, and his appeal was pending in the State Supreme Court. At the time of argument there were no restrictions on what might be spoken or might be written about the criminal case. In evoking the "capable of repetition, yet evading review" doctrine of Southern Pacific Terminal Co v ICC, supra, the Court indicated that the controversy between the parties was capable of repetition. If the criminal defendant's conviction were reversed and a new trial were ordered, the trial court might enter another restrictive order, and secondly, the state supreme court's decision authorized state prosecutors to seek restrictive orders in other appropriate cases. Therefore, the court found that the dispute between the state and the media was capable of repetition and that if the issue were not addressed, the dispute would evade the review or at least considered plenary review since the orders by their nature were so short-lived.

In Rescue Army v Municipal Court, 331 US 549; 67 S Ct 1409; 91 L Ed 1666 (1947), while concluding that jurisdiction existed, the Court found compelling reasons existed for not excrcising it. The suit was an appeal from a judgment of the Supreme Court of the State of California which denied a writ of prohibition against a pending prosecution for violation of municipal ordinances governing the solicitation of contributions for charity. The appeal was dismissed without prejudice to the future determination

of the constitutional validity of the ordinances. In refusing to exercise jurisdiction, the Court indicated that a policy of accelerated decision might do great harm to the security of private rights without attaining any benefits of tolerance and harmony for the functioning of various authorities in our scheme of government. The issues which were presented were in highly abstract form. The individual petitioner was not presenting a criminal trial for review, and the court was not even presented with a text of the charges against him. The state procedure in prohibition was compared by the Court to a declaratory judgment procedure, and it was stated that in effect the suit sought a judicial declaration that jurisdiction did not exist in the municipal court. The court stated that for a variety of reasons the shape in which the underlying constitutional issues reached the court presented obstacles to the exercise of jurisdiction. Those reasons were not only prematurity and comparative abstractness due to the nature of the prohibition proceedings but also the fact that a volume of legislative provisions were involved which were intertwined and which were complicated by the California Supreme Court's disposition of them and this Court's own determinations in the companion case.

The foregoing discussion of the cases cited by counsel for Doran demonstrates that those cases are distinguishable and not determinative of this matter.

Consideration of a federal habeas corpus case involving a serviceman who was released from the military by use of the writ may be helpful. In Eagles v United States ex rel Samuels, 329 US 304; 67 S Ct 313; 91 L Ed 308 (1946), an individual claimed exemption from military service because he was a theological student. However, he was classified I-A and inducted into the Army. He filed a petition for writ of habeas corpus seeking release from military custody, and the district court ordered the writ of habeas

dismissed. On appeal the Circuit Court of Appeals reversed and remanded the cause to the district court and directed that court to discharge Samuels from military custody without prejudice to further proceedings under the Selective Service Act. After remand, the district court ordered the release of Samuels, and he was unconditionally released from military service. Certiorari was granted and Samuels contended in this Court that the case was moot because he was no longer in the custody of the military or of anyone else and that he was therefore free to go wherever he chose. This Court indicated that if the writ of habeas corpus had been denied in the lower courts, and pending the disposition of the appeal, Samuels had obtained a discharge from the Army, the case would be moot.

In determining the question of mootness, it was stated that habeas corpus is a means of making a judicial inquiry into the cause of restraint of liberty and that if the restraint of liberty is terminated without the use of the writ, the case is finished. However, if custody of an individual is ended through the use of the writ, the situation is different.

> "Our rules recognize the beneficient function of the writ . . . by providing that a prisoner to whom the writ has been granted may, pending appeal, be enlarged on a recognizant. Rule 45. The fact that he has been so enlarged does not render the appeal of the custodian moot. . . . In such a case the release is obtained through the assertion of judicial power. It is the propriety of the exercise of that power which is in issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. . . . Affirmance makes the prisoners release final and unconditional. Reversal undoes what the habeas corpus court did and makes lawful a resumption of the custody. . . ." (citations omitted) 329 US 307-308.

Although Samuels attempted to obtain his release pursuant to the federal habeas corpus statute, the case is certainly analogous to the one at bar and reversal of the Michigan Supreme Court would

make lawful a resumption of the custody of Doran. See also, Eagles v United States, ex rel Horowitz, 329 US 317, 67 S Ct 320, 91 L Ed 318 (1946).

The Michigan statutes provide that the Governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. MSA 28.1285(20); MCLA 780.20. In the case at bar, the Governor has not recalled his warrant and has not issued another. The initial warrant which he issued remains outstanding and would have been executed but for the opinion of the Michigan Supreme Court which in effect granted the writ of habeas corpus. However, the Michigan Supreme Court could not order the Governor to withdraw his warrant. The judiciary is not authorized to interfere with the determination of a coordinate branch of the government. Germaine v Governor, 176 Mich 585 (1913).

At this time, Doran's attorney, based on a less than exhaustive search for a client who at this time has no need to contact his attorney, asserts that there is no case in controversy. However, nothing could be further from the actual state of facts. There is an individual who was released, the People contend erroneously, and who remains at large while a valid Governor's warrant exists commanding the arrest of that individual. While that individual has felt no need to contact his attorney, that does not mean that he either is not now or will not in the future be within the jurisdiction where that warrant could be executed. As long as the State of Arizona does not have custody of Harold Doran and the Michigan Governor's warrant remains outstanding, this controversy is not moot.

CONCLUSION

For the foregoing reasons, this Court is respectfully

urged to deny the relief requested in the Memorandum Suggesting Mootness.

Respectfully submitted,

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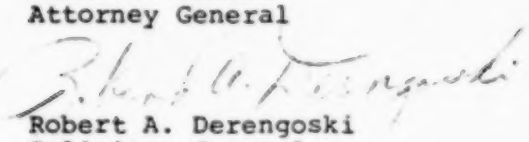

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